Supreme Court, U.S.
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No. 98-1677

In The

Supreme Court of the United States

JOHN GARY BYERLY, JR.,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh District Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent restates the Questions Presented as follows:

1. Should this Court decline to grant certiorari to review a fact-specific application of the well-settled precedents of this Court to the particular circumstances of Petitioner's case?

PARTIES TO THE PROCEEDINGS

The Petitioner failed to list the parties. The Parties are:

JOHN GARY BYERLY, JR.,

Petitioner

THE STATE OF OHIO,
As represented by the
Portage County Prosecutor's
Office, in Ravenna, Ohio.

Respondent

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OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATEMENT OF THE CASE

This matter originated in The Portage County Court of Common Pleas in Ravenna, Ohio, with the Petitioner's conviction for the murder of his wife Ivy Lynn Byerly. On October 31, 1996, the Portage County Grand Jury, in Ravenna, Ohio, returned a true bill of indictment, charging John G. Byerly, Jr., ("Petitioner") with murder. On February 11, 1997, the matter proceeded to a bench trial after the Petitioner waived his right to a jury trial. The Portage County Court of Common Pleas entered an order finding the Petitioner guilty of murder on February 20, 1997. On February 24, 1997, the Petitioner filed a Motion for a New Trial. The Court of Common Pleas found that the Motion for New Trial was not well taken and overruled the Petitioner's motion on March 19, 1997. An appeal followed in the Ohio Court of Appeals for the Eleventh Appellate District. On August 24, 1998, that court affirmed the Petitioner's conviction and sentence in all respects. An application for reconsideration to the

Eleventh District Court of Appeals was denied on September 14, 1998. Petitioner then filed a Memorandum in Support of Jurisdiction with the Supreme Court of Ohio, which was denied on January 20, 1999. The Petition for Certiorari to this Honorable Court follows.

STATEMENT OF THE FACTS

On October 26, 1996, the Petitioner and his wife the victim, Ivy Lynn Byerly, (Ivy) had a Halloween party at their home in Ravenna, Ohio. Guests began arriving at the party around 6:00 p.m. that evening.

After the party ended, Melissa and Michael Hartman, who were friends of the Petitioner and his wife, remained to help clean up from the party. As they were cleaning, the Petitioner announced that he was going to take his two younger sisters home, rather than allow them to spend the night as previously planned. This made Ivy visibly nervous.

Later, at about 1:00 in the morning, the Hartmans, who were now back at their own home, received a phone call from a distraught Ivy. She told Ms. Hartman that the Petitioner had struck her in front of their three-year-old son and that she was bleeding. Concerned for her friend's safety, Ms. Hartman called the Portage County Sheriff's Department at approximately 1:18 that morning.

Thereafter, the Portage County Sheriff's Office received at least three emergency calls from Melissa Hartman during the early morning hours of Sunday, October 27, 1996. Melissa Hartman testified that she told the

dispatcher that her girlfriend (Ivy Byerly) called her, crying. Ivy explained that her husband hit her and that she was bleeding. Because she was so worried, Ms. Hartman called the Sheriff's Office repeatedly to insure that someone would go out to the Byerly house to check on Ivy. When she discovered during a subsequent call that no one had responded to the scene by her second call, she decided to call Ivy's mother, Donna Stough.

In the meantime, Deputy Hudock of the Portage County Sheriff's Department received a call from his dispatcher to respond to 7200 Redbrush Road (the Byerly residence). When Deputy Hudock arrived, there were some dim lights on that enabled him to see the entire first floor of the residence. Shortly thereafter, Deputy Sisco arrived, followed by Deputy Withers. Deputies Hudock and Sisco knocked on the front door, but got no response. They continued knocking on the door. In the meantime, Deputy Withers went around to the back of the residence in order to check for any movement from within the house, maintaining radio contact with the other deputies at all times.

At some point shortly thereafter, Donna Stough and her then boyfriend, now husband, William Cornelius, arrived at the residence. They came because they were concerned for Ivy, due to the Petitioner's history of violent behavior towards his wife. Deputy Hudock spoke with Stough and Cornelius in order to determine who they were and why they were there. They advised Deputy Hudock that Donna Stough was Ivy's mother and that Melissa Hartman had called her to tell her that there was a problem at the residence and that Ivy may be in danger from the Petitioner. Ms. Stough, fearing for Ivy's

safety, tried to get into her daughter's house but the doors were locked.

The Sheriff's deputies continued checking around outside for signs of anyone inside. While knocking on the front door, Deputy Hudock received a report from Deputy Withers, who was around the back of the house. Deputy Withers reported that he saw a large white male, whom Ms. Stough identified as the Petitioner, walking around upstairs. Therefore, Hudock pounded louder and shouted to the Petitioner, "Sheriff's Department". Ms. Stough then began yelling for the Petitioner and Ivy.

A couple of minutes later, Deputy Sisco, at the prompting of William Cornelius, discovered that a front window was unlocked. Deputy Sisco did not open the window, nor did he assist Donna Stough, who then immediately and without hesitation, opened and crawled through the window. Donna then proceeded to run partway up the stairs in search of her daughter. At that point, William Cornelius, and the deputies who were still outside, called out to Donna to stop, and to unlock the door.

Donna Stough was yelling for the Petitioner when he started to come down the stairs towards her, but then he suddenly turned around and headed back up the stairs. After unlocking the front door, Donna turned and immediately dashed up the stairs, following the Petitioner. At this point, the deputies followed Ivy's mother up the stairs and into a bedroom where they made a grisly discovery. The Petitioner was sitting in the room and on the floor was Ivy, bruised, battered, and unconscious, with both of her young children nestled on either side of her.

Ivy was not responsive and was breathing shallowly, with a grumbling sound. She had what appeared to be abrasions and contusions on her face and neck. An emergency ambulance squad was immediately called to the scene.

While attempting to provide medical assistance to Ivy, the deputies observed blood on the carpet, a rag, and a pair of socks. They also observed a broken telephone in the kitchen and a pair of sweat pants. After Deputy Matt Skilton secured the scene, Deputies Hudock and Skilton were instructed by Lieutenant John Ristity to take these items into evidence. At the same time, Lieutenant Ristity took pictures of the residence and instructed Deputy Hudock to do a crime scene sketch.

Ivy was rushed to Robinson Memorial Hospital. From there she was life-flighted by helicopter to the Metro Health Medical Center in Cleveland, Ohio. She had sustained a broken right arm and she had many bruises on her head, face, and neck. At Metro Health, doctors determined that Ivy had also sustained a subdural hematoma on the left side of her brain. There were signs of strangulation and asphyxiation. She was later pronounced brain dead by Dr. Ripepi at 1:20 p.m. on Oct. 27, 1996.

That evening Lieutenant Ristity sought and received a nighttime search warrant to gain access to the residence at 7200 Redbrush Road (the Byerly residence), in Franklin Township, Ohio. Judge John A. Enlow signed this warrant at 10:26 p.m. on October 27, 1996. Upon the issuance of the search warrant, Lieutenant Ristity returned to the residence and retrieved a telephone cord, blood samples

from the carpet, and blood samples from toys in the living room.

Following the criminal trial, the court found the Petitioner guilty of murder on February 20, 1997. At the hearing on sentencing, the court ordered the Petitioner to serve an indefinite term of imprisonment of not less than fifteen years to life for the offense of murder as charged in Count One of the Indictment.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF THE SETTLED PRECEDENT OF THIS COURT TO THE PARTICULAR CIRCUMSTANCES OF PETITIONER'S CASE

This Court has repeatedly held that it will not exercise its certiorari jurisdiction merely to review a decision of a state court turning upon the analysis of the particular facts involved. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2347, 41 L.Ed.2d 341 (1974); *Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318, 79 L.Ed.2d 714 (1984); *United States v. Johnston*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1924). Respondent respectfully submits that this is precisely the type of decision that Petitioner now asks this Court to grant certiorari to review.

The decision of the Eleventh District Court of Appeals for the State of Ohio that Petitioner asks this Court to review applied the well-settled precedent that a warrantless search of a home may be justified upon a showing of exigent circumstances. Respondent is well

aware that this Court has consistently held that entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant or an applicable exception to the warrant requirement. *See Payton v. New York*, 451 U.S. 212, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Johnson v. United States*, 333 U.S. 10, 13-15, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948). Respondent argues that the Eleventh District Court of Appeals for the State of Ohio correctly applied the well-established exception to the search warrant requirement; the exigent or emergency circumstances exception. This Court has consistently held that exigent circumstances can justify a warrantless search. The Fourth Amendment does not require police officers to delay in their course of investigation if to do so would gravely endanger their lives or the lives of others. *See Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). Respondent submits that the Eleventh District Court of Appeals for the State of Ohio properly applied the stated rule of law in regards to exigent circumstances.

Respondent further submits that the Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. The Petition has failed to show in this particular case and the circumstances surrounding it, that this case warrants a grant of review by this Court. The Petitioner is seeking to have this Court review his conviction based upon allegations in the Petition of asserted error. The Petition specifically alleges that the lower court misapplied a properly stated rule of law. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous

factual findings or the misapplication of a properly stated rule of law. *See* Rule 10 of the Rules of this Court.

Rule 10 of the Rules of this Honorable Court states in part, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only for compelling reasons.*" (Emphasis added.) No compelling reason exists in this case. The Petitioner's case presents no question of paramount importance or widespread application, nor is it a case of first impression for this Court's review. Respondent respectfully submits that the Petitioner has not shown any grounds under which this Court should grant a review of his Petition.

II. EXIGENT CIRCUMSTANCES EXISTED JUSTIFYING THE WARRANTLESS ENTRY NTO THE HOME OF THE PETITIONER AND THE VICTIM

The foundation of all of the Petitioner's claims is based upon his allegation that the entry into his home was illegal. A quick review of the facts will show that Petitioner's allegation is not meritorious, because Petitioner's entire argument relies on and is founded upon that faulty contention, it follows that the rest of the Petitioner's claims are without any support.

Respondent submits that the Sheriff's Deputies in the case at hand were responding to a request for help, and that the deputies acted prudently and wisely before making the warrantless entry. The Eleventh District Court of Appeals for the State of Ohio correctly found that the deputies at the scene were justified when entering the residence without a search warrant under the emergency

or exigent circumstances exception to the search warrant requirement.

The determination of whether the officers had a reasonable suspicion of an emergency situation, thus allowing for the warrantless entry, is to be based upon the totality of the circumstances known to the deputies at that time. Once the deputies were dispatched to the Byerly residence to conduct a welfare check, they had a duty to make sure nobody in the house was in need of their assistance. The least intrusive way to accomplish this was to knock on the door and attempt to get the persons within the house to answer the door. When the police received no response, they were rightfully concerned that there may be someone inside in need of their assistance. The facts of the case demonstrate that the deputies' actions were justified and the Petition has failed to show otherwise.

As the circumstances of the situation at the residence on the night of the murder escalated, it became increasingly apparent that, when taking all the factors together, an emergency situation had developed and that someone inside may need help.

By looking to the facts as they unfolded to the deputies that evening, it becomes clear why they had to act. The police were acting based upon the following facts: 1) the Sheriff's Department had received three telephone calls from Melissa Hartman, a friend of the victim, who was concerned that something had happened to the victim; 2) Hartman asked the Sheriff's department to go check on the victim, Ivy, to make sure she was all right; 3) upon arriving at the residence, the Sheriff's deputies

received no response from within the house; and 4) in spite of repeated attempts to get someone to answer, no one came to the door. These facts combined with the facts below, all served to heighten the concern the deputies had that someone may be inside and in need of help.

Shortly after arriving on the scene, the Sheriff's deputies were confronted by the victim's mother, Donna Stough, and Stough's boyfriend, William Cornelius. They had come to the house because Hartman had called them to inform them of the danger that Ivy, the victim, was in. Both Ivy's and the Appellant's vehicles were in the driveway, an indication that both were home. One of the deputies reported that a large male was walking around upstairs, ignoring the deputy's, as well as the victim's mother's, frantic calls to get him to come and answer the door. The police observed the victim's mother frantically running around attempting to get someone to answer her calls.

The victim's mother and her boyfriend came over out of concern for the victim's welfare at 2:00 a.m. This fact, along with the information that Donna Stough had communicated to the deputies concerning the Petitioner's past abusive behavior towards the victim, served to heighten the deputies' level of concern for the safety of Ivy. This information led them to the conclusion that the victim may be inside the house and in need of assistance from the police.

Upon arriving at the residence that night, the deputies did not know all the circumstances. Upon gathering more information, and witnessing developing events, they ultimately came to understand the need for entering

the house without waiting for a warrant. The Eleventh District Court of Appeals for the State of Ohio correctly noted that the deputies acted prudently and reasonably in knocking on the doors and trying to rouse the occupants before going inside. There was no indication that the deputies intended to conduct a warrantless search by using the emergency exception as a pretext. All of the facts point to the conclusion that the deputies acted out of concern for the safety of those inside the house.

Looking to the totality of the circumstances as presented to the deputies at the scene that night, it is obvious that the situation escalated and the facts revealed themselves to give the deputies cause to believe that the victim was inside and may be in need of their assistance. After the victim's mother entered the residence on her own volition, the situation quickly became dangerous and the Sheriff's deputies had to act. Clearly the deputies were justified in entering the residence. The Petition has failed to show that the decision of the Eleventh District Court of Appeals for the State of Ohio was erroneous.

It is well-established law that a warrantless police entry into a private residence is not unlawful if made upon exigent circumstances. As this Court has pointed out, "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Mincey v. Arizona*, 437 U.S. 385, 392-393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290, 300 (1978), quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963), *certiorari denied*, 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86 (1963). In *Wayne*, then federal Court of Appeals Judge Warren Burger explained the reasoning behind the exigent circumstances exception:

> "[T]he business of policemen and firemen is to act, not to speculate or mediate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation of the judicial process."

Wayne at 212.

In this case, the deputies' warrantless entry was certainly justified by their reasonable belief that it was necessary to act in an emergency that may be threatening life and limb. They were responding to a report of domestic violence, a potentially explosive situation. Upon arriving on the scene, and gathering more information, it became apparent to the deputies that they had to act quickly.

Respondent points out that the Petitioner's argument, if successful, would lead to a rule that would require police, who are responding to a call for help concerning domestic violence, to wait and get a search warrant while the victim continues to be brutalized by wife-beaters such as the Petitioner. Situations of domestic violence are clearly an emergency that threatens life or limb; the type of emergency that the exigent circumstances exception was designed to encompass.

Because the police entered the residence only after gathering more information and observing the situation as it developed, the Petitioner asserts that the police could not have believed that an emergency existed. This type of reasoning would lead to a rule that would require the police to make a choice to either immediately enter a

residence upon responding to a domestic violence dispute, or to send someone to get a search warrant while the victim is further brutalized. Simply put, the Petitioner's reasoning is ludicrous.

Police must be able to approach a scene with the knowledge and understanding that should developing facts present themselves in a manner that is indicative of an emergency situation, the police will be able to respond accordingly in order to protect those in need. Anything less would defy the spirit of the emergency or exigent circumstances exception to the search warrant requirement.

III. THE PETITION HAS FAILED TO SHOW ANY TYPE OF AGENCY RELATIONSHIP BETWEEN THE VICTIM'S MOTHER AND THE SHERIFF'S DEPUTIES

The Petitioner has erroneously characterized the holding in *State v. Bohannon*, 596 P.2d 190, 195 (Kan. App. 1979). Even a cursory reading of the *Bohannon* opinion will reveal that the six factors the Petitioner claims are the test for a police/citizen agency relationship were merely examples of *other* court's opinions where an agency relationship could be found. The *Bohannon* court was merely citing possible scenarios where other courts have found that an agency relationship existed, and then used them as examples to analyze situations where the question of agency arose. Respondent contends that the *Bohannon* court did not set out the examples as any hard and fast test for determining when an agency relationship had developed.

The Petitioner incorrectly contends that the Eleventh District Court of Appeals for the State of Ohio has adopted the *Bohannon* test for an agency relationship between a private citizen and the police during a search. Nowhere in the Eleventh District's Opinion does the court specifically adopt any test for agency used in *Bohannon*. The Eleventh District Court of Appeals for the State of Ohio used *Bohannon* as an illustration of what types of conduct and behavior can result in an agency relationship between the police and a private citizen. The factors cited in *Bohannon* are not singularly determinative, contrary to the Petitioner's assertions.

Respondent also points out that the Petitioner, in addition to erroneously asserting that the Eleventh District Court of Appeals for the State of Ohio has adopted the so-called "test" from *Bohannon*, seems to be confused himself as to whether or not the Eleventh District Court of Appeals for the State of Ohio has adopted the so-called *Bohannon* test. For example, on page five of the Petition, he argues that the Eleventh District Court of Appeals for the State of Ohio adopted the test in *Bohannon*, but failed to properly apply it. *See* page 5 of the Petition for Writ. Then on page eleven the Petitioner states that the court *partially* adopted the *Bohannon* test, but failed to apply it properly. *See* page 11 of the Petition for Writ. Respondent asserts that the Eleventh District Court of Appeals for the State of Ohio used the *Bohannon* factors as examples of situations where an agency relationship may develop, not as any hard and fast test. The only person who seems to have adopted the so-called *Bohannon* "test" is the Petitioner.

The State submits that the actions of the victim's mother and the deputies at the scene that night did not in any way give rise to an agency relationship. The facts show that the victim's mother acted out of her own concern for her daughter's welfare and not upon any police request. The deputies did not ask, nor did they direct, Donna Stough to enter the residence. The commanding officer did not assist the victim's mother; she opened the window herself. She entered her daughter's home on her own, with no help from the deputies. Certainly the situation that night was not one that constituted an agency relationship between the Sheriff's deputies and the victim's mother.

IV. THERE IS NO CONFLICT AMONG THE CIRCUITS NECESSITATING REVIEW BY THIS COURT

The Petitioner correctly points out that many of the federal circuit courts utilize various examples when analyzing situations involving questions determining whether an agency relationship has developed between a private entity and a governmental agent. Respondent points out that this is merely a reflection of the wide range of possibilities that may present themselves, and how any proposed catch-all test would not likely be able to cover them all. Respondent argues that the cases cited by the Petitioner are illustrative of the fact that there are many possible scenarios in which an agency relationship between a private entity and the police may or may not develop.

The complexity of the wide range of possibilities that could develop in situations of alleged police/citizen agency relationships gives credence to the conclusion that the United States Court of Appeals for the First Circuit came to in its decision in *United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997). In *Pervaz*, the court, after perusing the other circuits and their holdings in cases determining whether a private entity has acted as a government agent, stated the following:

> "We think that any specific "standard" or "test" is likely to be oversimplified or too general to be of help, and that all of the factors mentioned by the other circuits may be pertinent in different circumstances: the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests."

Id. at 6. Respondent submits that the court in *Pervaz* correctly noted that any specific or standardized test would likely be too general, and would be of little help.

Even if this Court would decide that it needed to articulate a standard or rule that would define when an agency relationship has developed between a private entity and a governmental agent, Respondent contends that the underlying facts of this Petitioner's case do not present this Court with a good opportunity to articulate a standard that would provide clear guidance to the courts below. Therefore this Court should decline to review Petitioner's case.

V. THE PETITIONER HAS FAILED TO SHOW HIS TRIAL COUNSEL WAS INEFFECTIVE

As this Court has articulated before in *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), the essence of an ineffective-assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. *Id.* at 2582. *See also, e.g., Strickland v. Washington*, 466 U.S., 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 2044-2046, 80 L.Ed.2d 657 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, *e.g., Strickland*, 466 U.S., at 688, 104 S.Ct. at 2064, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S.Ct. at 2068.

This Court further stated in *Kimmelman v. Morrison*:

> "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Thus, while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have

> separate identities and reflect different constitutional values."

Id. at 2583. Respondent argues that because the Petitioner's underlying Fourth Amendment claim is without merit, it follows that his claim for ineffective assistance of counsel lacks sufficient support and is without merit.

The Eleventh District Court of Appeals for The State of Ohio found that Petitioner's trial counsel was not ineffective because, based on the facts presented, a motion to suppress did not have a "reasonable possibility" of prevailing. Specifically, the court found that the Sheriff's deputies' warrantless entry of the Petitioner's residence was not a violation of the Petitioner's constitutional rights. This finding was predicated on the court's findings that: 1) the mother of the victim was not an agent for the Sheriff's deputies upon entering the house; and 2) that exigent circumstances existed based upon the totality of the circumstances. A perusal of the facts indicates the court's decision was correct.

Respondent contends that the Petitioner has not shown that his trial counsel was ineffective. A defendant's constitutional right to effective assistance of counsel does not require defense counsel to file a motion to suppress in every case. Respondent respectfully submits that a defense attorney is not required to file a motion to suppress where the possibility of its being granted is remote. Requiring otherwise would place an undue burden upon the prosecution to insist upon the filing of a motion to suppress in every case.

Because the Petitioner has failed to show that his underlying Fourth Amendment claim is meritorious, or that the result of the proceeding would have been different had a motion to suppress been filed, Respondent submits that any claims alleged by the Petitioner involving ineffective assistance of counsel premised upon the failure of Petitioner's trial counsel to file a motion to suppress are without merit and the Petition should be denied.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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